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Supreme Court of the United States

October Term 1969

No. ~~44~~ 7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF ON REARGUMENT

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February 2, 1970

SUPREME COURT OF THE UNITED STATES

October Term 1969
No. 11

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

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I

Defendant Mackell devotes a major portion of his brief to the argument that the injunction sought here, pursuant to 42 U.S.C. §1983, is barred by 28 U.S.C. §2283. Although this precise question was extensively briefed (but not decided) in *Cameron v. Johnson*, 390 U.S. 611 and has been discussed *in extenso* in a number of opinions in the lower courts, see *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. denied* 381 U.S. 929; *Cameron v. Johnson*, 262 F. Supp. 873 (S.D. Miss 1966), and in legal periodicals, see Note, *The Dombrowski Remedy-Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers L.Rev. 92, we take the liberty of responding once again to defendant's argument.

The prohibition presently contained in §2283 was enacted, as defendant Mackell points out (Br. p. 13), at a time in our history when "the rights of the states were of primary concern."[1] Times, however, have changed and the changes that the statute has undergone are a recognition that the absolute prohibition contained therein is not appropriate to our day.

In addition to the amendments of the statute itself, many exceptions had been forged both by Congress, see *inter alia*, the federal removal provisions, 28 U.S.C. §§1441–1450, the Federal Habeas Corpus Act, 28 U.S.C. §2281, and the Interpleader Act, 28 U.S.C. §2361, and by judicial decision, see *inter alia*, *Leiter Minerals, Inc. v. United States*, 352 U.S. 200, *United States v. Wood*, 295 F.2d 772 (5th Cir. 1961) *cert. denied*, 369 U.S. 850, *Dombrowski v. Pfiester, supra.*

Another statutory exception, we urge, is 42 U.S.C. §1983. That act was passed in 1871 at a time in our history when the rights of the states were not the primary concern of Congress. Rather, the Congressional concern at that time was to limit freedom of the states to destroy the recently enacted Fourteenth Amendment. This was recognized by both proponents and opponents of the statute. As Professor Amsterdam has recently pointed out

> "It is impossible to read [the debates] . . . without concluding that the federal legislatures were intensely aware of the hostility and anti-union prejudice of the Southern state courts and of the use of state court proceedings to harass those whom the Union had an obligation to protect". Amsterdam, *Criminal Prosecution Affecting Federally Guaranteed Civil Rights*, 113 U.Pa. L.R. 793,825 (1965).

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1. The clause containing the prohibition was passed in 1793 as part of a statute amending the Judiciary Act of 1789. The clause read "[N]or shall a writ of injunction be granted by a Federal Court to stay proceedings in any court of a state." Ch. 22, §5, 1 Stat. 333,335.

Supporters of the bill repeatedly complained that the courts in the southern states gave no justice and were, indeed, instrumentalities of injustice. Opponents of the bill, on the other hand, argued that the bill was "a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States." Congressional Globe, 42d Cong., 1st Sess. App. 50. It was further argued that the law was "designed to transfer all criminal jurisdiction from the courts of the states to the courts of the United States." *Id* at App. 179.[2]

To argue that Congress in 1871, when it was seeking to protect the newly emancipated slaves from the actions of the southern state courts, intended this highly controversial legislation to be subject to §2283 is to fly in the face of reason. Such an interpretation attributes to Congress, sitting in 1871, views concerning our federal system which could have only been appropriate 80 years earlier.

It is not surprising that the question of federal-state relationships should arise again in the 1960s since our present period of history resembles in many respects that of 100 years ago and we are seeking now to complete the work which the Fourteenth Amendment left undone. To read §2283 as a limitation upon §1983 is as much an anomaly today as it would have been when the Act of 1871 was passed.

The defendants argue that plaintiffs' interpretation of §1983 would interfere with state courts in their prosecution of penal offenses. That is precisely what it intended to do – but only where the state sought to deprive persons of their constitutional rights. Here §1983 will only stay prosecution of counts one, two, three, four, six and seven of the indictment which relate to the criminal anarchy statute. As the defendant

2. Further excerpts from the debate as well as a much more extensive historical survey can be found in *The Dombrowski Remedy – Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights, supra* at pp. 109-113.

Lefkowitz correctly points out (Br. pp. 4-5) the issue of an injunction here will not "stay prosecution under the other statutes involved in the indictment", for these other statutes do not on their face raise constitutional issues and §1983 was never intended to apply to them.

II

Defendant Mackell argues (Br. pp. 33-34) that no chilling effect on the exercise of First Amendment rights can occur in the instant case because the sections of the Penal Law under which the plaintiffs were indicted (§§160–161) have been repealed. But the Criminal Anarchy sections of the new Penal Law[3] are as unconstitutionally vague and overbroad as were the old. The new law does not contain any requirement of "specific intent" to overthrow the government; thus, like the old law, it makes criminal the mere teaching and advocacy of certain doctrines.

Furthermore, the new law, like the old, contains no requirement that a "clear and present danger" must be shown before activity can be punished. Indeed, the only significant difference between the old law and the new is that the new statute is limited to advocacy of the overthrow of the government of "this state". This limitation is a recognition that the previous statute's term "organized government", interpreted in *People v. Gitlow*, 234 N.Y. 132,138 to mean "all organized government in this country, whether it be that of the city, state or nation", was unconstitutional in the light of this Court's decision in *Pennsylvania v. Nelson*, 350 U.S. 497.

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3. Sec. 240.15 of the new Penal Law reads as follows: "A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (3) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow."

Defendant Lefkowitz assumes (Br. p. 6) that the new statute will be governed by the standards set forth in *Epton*. Even were such standards applicable to the new statute, that is hardly dispositive of the issue for, as we argued in our brief (Br. pp. 11-14), the *Epton* standards themselves are unconstitutionally vague.

Defendant Mackell's citation of *Douglas v. City of Jeannette*, 319 U.S. 137 (Br. p. 21)[4] ignores more recent decisions of this Court holding abstention inappropriate where state law is unambiguous or where a state court interpretation of a law will not avoid the constitutional issue. See [illegible] *v. Forssenius*, 380 U.S. 528, 535, and *Baggett v. Bullitt*, 377 U.S. 360, 375-579. This is precisely the situation presented here, for New York's highest court has already interpreted the Criminal Anarchy Law and, we urge, in an unconstitutional manner. Hence, the constitutional issues raised by the plaintiffs will not be avoided or altered by awaiting yet another determination by the New York Court of Appeals on these issues.

III

The defendants' other arguments in their brief do not answer those raised by the plaintiffs. Defendant Mackell's characterization of the *Epton* decision (Br. p. 40) as one involving a "narrower construction" of a statute[5] completely ignores the fact that since *People v. Gitlow*, 234 N.Y. 132, authoritatively construed the statute more than 40 years ago, *Epton* involved a reinterpretation of a statue and not a "narrower construction" of an otherwise uninterpreted statute.

Furthermore, defendant Mackell's discussion of *Epton* (Br. pp. 40-41) does not answer plaintiffs' argument (Br. pp. 24-27) regarding lack of notice, for the *acts* with which the plaintiffs are charged (and presumably to which the *Epton* standards will apply) all occurred prior to the *Epton* decision.

4. See also defendant Lefkowitz' brief (p. 6).

5. Defendant Lefkowitz (Br. pp. 14-15) makes the same point.

Shuttlesworth v. Birmingham, 394 U.S. 147, does not hold, as defendant Lefkowitz claims (Br. pp. 14-15), that where a court has given a new and unforseeable interpretation to a statute, a defendant "must be governed by the new interpretation or be subject to reversal." *Shuttlesworth* holds that a defendant's acts are to be judged under the statute existing at the time his acts were committed.

Finally, defendant Mackell erroneously states (Br. pp. 44-45) that the grand jury which returned this indictment was not governed by the $250 property qualification contained in the former New York Judiciary Law, §596(3). The defendant himself admits in his statement of the case (Br. p. 3) that the present indictment was returned by the 1967 Grand Jury, a grand jury which had been selected when §596(3) of the Judiciary Law was still in effect. This Court's recent decision in *Turner v. Fouche*, _____U.S.____, 38 U.S. Law Week 4090, (January 19, 1970) holding Georgia's requirement that school board membership be limited to freeholders violated the equal protection clause of the Fourteenth Amendment, is dispositive of plaintiffs' attack on the property qualifications here. This Court's statement in *Turner v. Fouche*, *supra* at 4094 that "it seems impossible to discern any interest the [freeholder] qualification can serve" is equally applicable to the instant case for poverty or affluence bear no relationship to competency to serve as a grand juror.

CONCLUSION

The judgment of the court below should be reversed and the court directed to issue a declaratory judgment that former §§160, 161 and 163 are unconstitutional and to enjoin any prosecution of the plaintiffs under these sections.

Respectfully submitted,

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February 2, 1970